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No. 87-1796

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUTH MASSINGA, *et al.*,

Petitioners,

v.

L.J., *et al.*,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS*
CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION
OF SOCIAL WORKERS IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Were legal duties enforceable by damage suits under 42 U.S.C. §1983 "clearly established" by the 1961 foster care provision of the Social Security Act so as to deprive social workers of the defense of qualified immunity?

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MOTION FOR LEAVE TO FILE
BRIEF AS AMICUS CURIAE

National Association of Social Workers hereby respectfully moves for leave to file the within brief as amicus curiae in support of the Petition for Writ of Certiorari. The consent of the attorney for petitioners has been obtained. The

consent of the attorney for respondents was requested but refused.

Amicus is the largest association of social workers in the United States with over 115,000 members. It develops and seeks to improve professional standards in many fields of social work practice, including child welfare services. Many of its members work for state governments providing services to children in foster care and to families at risk.

Amicus has a greater familiarity with the professional demands on social workers than the parties in this case. From its unique perspective, amicus believes the court of appeals holds social workers to unrealistic and ill-defined standards of performance. If granted leave by this Court, amicus will show that the holding does not benefit American families and their children and, ultimately, will impair the effectiveness of the profession.

Amicus is better able than the parties to explain the practical effect of the denial of the qualified immunity defense in this case on the profession and those served by it. In holding that a 1961 funding statute established a clear duty of protection, the court of appeals erodes the qualified immunity defense in favor of a doctrine of unlimited liability. Requiring that social workers satisfy a vague standard of performance exposes them to second guessing for thousands of difficult decisions made decades ago. The Fourth Circuit falsely assumes that social work practice has over the last twenty years provided definitive guidelines for public agency workers to help them avoid harm to children in foster care. To the contrary, amicus recognizes that no professional concensus on standards exists even now and that maltreatment of children in foster homes often is difficult, and at times impossible, to prevent by even a very highly skilled and well-tranied social worker.

The court of appeals' discovery of a clearly established duty to protect foster children does not clarify the social worker's job or change the complexity of the judgments he makes. But it does unnecessarily and unfairly increase his risk. And by adding a further element of risk to a job that already offers limited economic and other incentives it will spur the exodus of child welfare workers from the public sector and will deter a new generation of social workers from entering this field of service. For all these reasons, amicus respectfully requests this Court to grant it leave to file its brief.

BRIEF OF AMICUS CURIAE

Statement of the Case

Plaintiffs are individual foster children and a class of foster children. They filed individual damage actions and claims for class declaratory and injunctive relief against twenty individual state administrators, supervisors and caseworkers

of the Baltimore City Department of Social Services foster care program. Invoking the qualified immunity defense in response to the damage claims, defendants filed a motion for partial summary judgment. The district court denied the motion. On appeal to the Fourth Circuit, defendants argued that neither a constitutional nor statutory duty to protect foster care children was clearly established. The court of appeals held that defendants had a clear and certain statutory duty and therefore they were not entitled to the immunity defense; the court did not decide whether defendants had a constitutional duty to protect children in foster care.

Reasons for Granting Review

- I. Defendant Social Workers Did Not Violate Clearly Established Law and, Therefore, May Not Be Deprived of the Qualified Immunity Defense.

The Fourth Circuit was wrong to hold that foster children have a clearly established

statutory right to care and protection enforceable through §1983 damage actions. See L.J. v. Massinga, 838 F.2d 118, 122 (4th Cir. 1988). This decision is inconsistent with settled doctrine of this Court that a government official performing discretionary duties is shielded from liability for damages insofar as his conduct does not violate clearly established rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Unless the law clearly proscribed the actions taken by an official, he is immune from suit. Mitchell v. Forsyth, 472 U.S. 511, 528 (1985).

Contrary to the holding of the court of appeals, the 1961 foster care provision, 42 U.S.C. §608(f) (repealed in 1980) did not create clearly established rights of foster children to care and protection. (App. 73a-78a). The case plan requirement contained in that statute was not so clear that "a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, ___U.S.____, 107 S. Ct.

3034, 3039 (1987). 1/ In essence, plaintiffs charge social workers with making wrong decisions i.e. placing foster children in or failing to remove them from homes that were unsuitable. See, e.g. District Court opinion (App. 26a). 2/ By stripping social workers of qualified immunity simply for making allegedly bad decisions, the court of appeals converts the defense into "a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." Anderson, supra, 107 S. Ct. at 3039.

It is difficult to conceive of a more abstract right than one to "care and protection." Deriving

1/ In floor debate on the Adoption Assistance and Child Welfare Act, 42 U.S.C. §627 et seq., Senator Cranston expressed the hope that new, more specific case plan requirements "will assist in providing the kind of focus for case plans that is missing under current law." 125 Cong. Rec. S15290-91 (daily ed. Oct. 29, 1979) (remarks of Sen. Alan Cranston)

2/ For example, plaintiff P.G. alleged that she was placed in a foster home where the parents were "unfit to serve as foster parents" in 1969, when she was a toddler. See District Court opinion (App. 29a).

such a right from the 1961 statute -- as the Fourth Circuit did here - does not inform social workers which of their actions are unlawful. In a well-intentioned effort to protect endangered children, the court of appeals imposes unrealistic standards of performance which the profession is unable to guarantee. 3/ A right to "care and protection" cannot be clearly established where a social worker in many difficult cases cannot assure it despite exercising reasonable skill and care. The reality is that child maltreatment is inherently difficult to predict, and often no public official is at fault or no decision is clearly correct. D. Besharov, The Vulnerable Social Worker 133 (1985). But the court of

3/ One commentator has observed that the expansion of child protective efforts over the last twenty years has not been accompanied by the development of precise standards. "Existing standards - and the decision-making they foster - are a direct reflection of society's over-ambitious expectations about the ability of social agencies and the courts to identify and protect endangered children." D. Besharov, The Vulnerable Social Worker 142 (1985).

appeals' decision sweeps so broadly that even the most careful social worker would have to stand trial if the goal of "care and protection" is not accomplished.

II. Denial of Qualified Immunity Adversely Affects Social Work Practice to the Detriment of Families and Their Children.

Until the Fourth Circuit's decision in this case, no circuit court had ever held that state social workers must stand trial for actions in violation of a statutory duty of protection. In finding such a right clearly established since 1961, and in permitting allegations of bad decisions as early as 1969 to go to trial, the court of appeals invites an entire generation of foster children to bring damage claims against social workers.

This holding will truly place public agencies charged with protecting the welfare of children "on the razor's edge." See DeShaney v. Winnebago County Department of Social Services, 812 F.2d

298, 304 (7th Cir. 1987), cert. granted, No. 87-154. This Court has recognized that the qualified immunity defense is designed to protect, not inhibit, the exercise of discretion. See, e.g. Anderson, 107 S.Ct. at 3038 (social costs of damage suits against government officials include inhibiting discharge of duties); Davis v. Scherer, 468 U.S. 183, 196 (1984) (officials routinely making close decisions should not always err on the side of caution); Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974) (immunity concept assumes that risk of error better than inaction).

The harmful effects of denying qualified immunity in this case go far beyond the defendant social workers. By raising social worker vulnerability beyond what is necessary or fair, the court of appeals creates a professional environment in which avoiding liability -- rather than serving children -- becomes the goal. Professionals performing an already inherently stressful job and others

contemplating entering this field of service will seek employment elsewhere. As one expert on child abuse and neglect has observed:

[I]f liability concerns preclude responsible decision making, then the whole system will collapse. Recruiting qualified people for children's services is hard enough. Salaries are low, working conditions poor, and positive feedback from clients minimal. There are many more rewarding areas of human services work. Continued, and rising, levels of liability could lead to the ultimate defensive social work; the best people may simply avoid the field.

Besharov, supra at 138.

Social workers called upon to make difficult judgments daily can hardly be expected to continue to accept a growing risk when the courts below offer them virtually no protection in return.

CONCLUSION

For all these reasons, and as further argued in the petition, amicus respectfully urges this Court to issue a writ of certiorari to review the decision of the court of appeals.

Respectfully submitted,

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